RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 10-1156

IN THE

Supreme Court of the United States

TROY BURDINE,

Petitioner,

v.

ARKANSAS DEPARTMENT OF FINANCE & ADMINISTRATION, RICHARD WEISS, DIRECTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Regarding the Federal Motor Carrier Safety Regulations, when an alleged disqualifying offense occurs in one State, and the licensure/disciplinary action occurs in another State, which of the two States' substantive law applies in determining whether the alleged offense occurred?

2. Does an administrative determination that a person was arrested based upon probable cause that the person was driving while intoxicated, equate to a "conviction" as defined in the Federal Motor Carrier Safety Regulations?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The corporate disclosure required by Rule 29.6 does not apply in this case.

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INTRODUCTION

Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. *See* Sup. Ct. R. 10(c). Moreover, Petitioner has failed to demonstrate that the Arkansas Trial Court or Arkansas Supreme Court interpreted an important question of federal law.

Petitioner suggests that this Court should decide whether or not Arkansas substantive law should apply to the disqualification of Petitioner's commercial driver's license ("CDL") as a result of a Driving While Intoxicated ("DWI") arrest that occurred in Missouri. As will be discussed in greater detail below, if a CDL holder is arrested in Arkansas for a violation of DWI, in violation of Ark. Code Ann. § 5-65-103, the person's CDL will also be disqualified for a period of one year pursuant to Ark. Code Ann. § 27-23-112 and 49 C.F.R. § 383.51(b)(1).

If the CDL holder is found "not guilty" of the Arkansas DWI offense, or if the charge is dismissed by the criminal court, Arkansas law provides that the disqualification be reversed by Respondent's Office of Driver Services. *See* Ark. Code Ann. § 5-65-402(d)(2)(B)(i). Conversely, Missouri law provides that the disqualification of a person's CDL as a result of a DWI arrest is independent of the adjudication of the criminal charges. *See* RSMo § 302.505.3.

In this case, Petitioner was arrested in Missouri for a violation of Missouri's DWI law. Despite the legal authorities relied upon by the Arkansas Supreme Court, Petitioner, without citation to any contrary legal authority,

requests this Court to fashion an absurd rule of law mandating that the directives of an Arkansas statute be imposed upon violations of a Missouri criminal statute, and that controlling Missouri statutes be disregarded.

In addition, Petitioner has asked this Court to interpret the definition of "conviction" as provided in 49 C.F.R. § 383.5 to preclude an administrative finding by a state agency. The plain language of 49 C.F.R. § 383.5 clearly contemplates that a finding by a state administrative agency may constitute a "conviction" for purposes of disqualification of a CDL. 49 C.F.R. § 383.5 provides, "Conviction means an unvacated adjudication of guilt, *or a determination that a person has violated or failed to comply with the law* in a court of original jurisdiction or by *an authorized administrative tribunal* [...]". (Emphasis added). Much like Petitioner's first point in his Petition, he provides no meaningful legal authority or analysis to support the proposition that the Arkansas Supreme Court incorrectly ruled that a finding by an administrative agency may constitute a "conviction" for CDL disqualification purposes.

Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. Accordingly, the Petition for Writ of Certiorai should be denied.

STATEMENT OF THE CASE

On July 1, 2007, Petitioner was arrested in McDonald County, Missouri, and charged with DWI, in violation of RSMo § 577.10. (R. 127, 131). The prosecuting attorney nolle prossed the criminal charge of DWI on October 15, 2007. (R. 7). Pursuant to Appelllant's request, the Missouri Department of Revenue, Driver License Bureau, ("MDR"), conducted an administrative hearing on October 23, 2007 regarding the suspension of Petitioner's driving privileges as a result of the DWI arrest. (R. 138-140). Petitioner did not personally appear at the hearing, but was represented by an attorney at the hearing. (R. 139). The MDR hearing officer made findings of fact and conclusions of law, which included, but was not limited to, the following:

> 2. The sole issue to be decided is whether by a preponderance of the evidence, the person was driving a vehicle pursuant to the circumstances set out in Section 302.505, RSMo.
>
> ...
>
> 4. Based upon the preponderance of the evidence presented at the administrative hearing, Petitioner is found to have been arrested/stopped upon probable cause to believe Petitioner was driving a motor vehicle while the alcohol concentration in the blood was at or above the limit required by Section 302.505, RSMo, or if under age twenty-one, was stopped while operating a motor vehicle with a blood alcohol content of .02% or more by weight,

> and the Notice of Suspension/Revocation was therefore properly issued to or served upon Petitioner pursuant to Section 302.515 or 302.520, RSMo.
>
> 5. Administrative suspension or revocation of Petitioner's privilege to drive in the State of Missouri is required by Sections 302.505 and 302.525 RSMo.
>
> NOW, THEREFORE, IT IS THE DECISION OF THE MISSOURI DEPARTMENT OF REVENUE, that the issuance of the Notice of Suspension/Revocation is SUSTAINED. Petitioner's privilege to drive in the State of Missouri is hereby suspended as authorized and required by Sections 302.505 and 302.525, RSMo.

(R. 140).

Petitioner's license suspension went into effect on November 14, 2007 and ran until February 12, 2008, a period of ninety (90) days. (R. 102). Regarding Petitioner's right to appeal the administrative findings, the MDR administrative decision also stated as follows:

> NOTICE
>
> If you do not agree with the decision made by the department, you may file a petition for Trial DeNovo in the Circuit Court in the county

> of arrest[1]. You must file the petition with the court by the effective date of your suspension/ revocation.
>
> *The Administrative Decision is independent of any criminal charges resulting from this arrest.*

Id. (Emphasis added).

In January 2009, Petitioner requested Respondent accept transfer of his CDL issued by the State of Oklahoma to the State of Arkansas. Upon transfer of Petitioner's CDL, Respondent, as required by 49 C.F.R. § 384.206(a)(2), reviewed Petitioner's driving record and noticed Petitioner's driving privileges had been suspended by the State of Missouri as a result of the July 1, 2007 DWI arrest, but Petitioner's CDL had not been disqualified. 49 C.F.R. § 383.5 defines "disqualification" as follows:

> *Disqualification* means any of the following three actions:
>
> (a) The suspension, revocation, or cancellation of a CDL by the State or jurisdiction of issuance.
>
> (b) Any withdrawal of a person's privileges to drive a CMV by a State or other jurisdiction as the result of a violation of State or local law relating to motor vehicle traffic control (other

1. Petitioner did not appeal the MDR administrative suspension of his driving privileges to a Missouri circuit court.

than parking, vehicle weight or vehicle defect violations).

(c) A determination by the FMCSA[2] that a person is not qualified to operate a commercial motor vehicle under part 391 of this chapter.

See also RSMo § 302.700.2(10).

49 C.F.R. § 384.206(a)(2) provides, in part:

(2) *Other States' records.* Before the initial or transfer issuance of a CDL to a person, and before renewing a CDL held by any person, the issuing State must:

(i) Require the applicant to provide the names of all States where the applicant has previously been licensed to operate any type of motor vehicle.

(ii) Within the time period specified in § 384.232, request the complete driver record from all States where the applicant was licensed within the previous 10 years to operate any type of motor vehicle.

Pursuant to 49 C.F.R. §§ 384.206 and 384.231, on February 3, 2009, Respondent notified Petitioner by letter that his CDL would be disqualified and scheduled an administrative hearing for February 17, 2009. (R. 111). 49 C.F.R. § 384.206(b) provides, in part:

---

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> (b) *Required action.* Based on the findings of the State record checks prescribed in this section, the State of record must do one of the following as appropriate:
>
> (1) Issue, renew, upgrade or transfer the applicant's CDL;
>
> (2) *In the event a State obtains adverse information regarding the applicant,* ***promptly implement the disqualifications****, licensing limitations, denials, or penalties that are called for in any applicable sections of this subpart*[.] (Emphasis added).

Similarly, 49 C.F.R. § 384.231(b) states as follows:

> (b) *Required action — (1) CDL holders.* A State must satisfy the requirement of this part that the State disqualify a person who holds a CDL by, at a minimum, suspending, revoking, or canceling the person's CDL for the applicable period of disqualification.

49 C.F.R. § 383.51(b)(1) requires that a CDL holder's privilege to drive a commercial motor vehicle be disqualified for one year if the driver operates a motor vehicle and is convicted of being under the influence of alcohol as prescribed by State law. Similarly, RSMo § 302.755.1 states:

> A person is disqualified from driving a commercial motor vehicle for a period of not less than one year if convicted of a first violation of:

> (1) Driving a motor vehicle under the influence of alcohol or a controlled substance, or of an alcohol-related enforcement contact as defined in subsection 3 of section 302.525[.]

The February 17, 2009 administrative hearing was eventually rescheduled to April 21, 2009[3]. (R. 109-110). At the April 21, 2009 hearing, Respondent's hearing officer concluded as follows:

> Decision of Hearing Officer:
>
> This is a contested hearing. Atty Bickett states that there is no conviction on licensee's driving record. The DWI in Missouri was dismissed by prosecutor nolle pros. The office states the Missouri Dept. of Rev constitutes a "conviction" of the Missouri DUI offense for the purposes of disq. of licensee's commercial driving privileges and because Missouri did not take action on the CDL, AR must impose the disq. pursuant to § 384.206 and § 384.231 of the

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3. Petitioner asserts in his Petition that Respondent's "Office of [Driver] Control effectively determined it did not know what to do regarding the matter, and referred [the matter] to their legal department." *See* Petition at 4. Pursuant to Sup. Ct. R. 15.2, Respondent is obligated to inform the Court of any misstatement of fact contained in the Petition. The February 17, 2009 administrative hearing was rescheduled to April 21, 2009 to provide Petitioner and Respondent's Office of Driver Control an opportunity to research whether the dismissal of the DWI by the Missouri criminal court would have any effect upon Respondent's obligation to disqualify Petitioner's CDL under the FMCSR. In the interim, Petitioner's CDL was not disqualified.

> Federal Motor Carrier Safety Regulations. Atty Bickett said the interpretation of the Fed codes as listed above are misinterpreted in whole or by part. Atty Bickett states that Missouri did in fact impose a restriction of licensee's driving privileges therefore Arkansas must give full faith and credit to Missouri's decisions. Under the codes listed above, further reading of the codes does not disqualify licensee. The office will uphold the disqualification.

(R. 12).

At the November 3, 2009 trial of this matter before the Benton County, Arkansas, Circuit Court, the Trial Court sustained the Respondent's hearing officer as follows:

> The Petitioner's commercial driver's license issued by the State of Oklahoma expired January 31, 2009. Defendant's Exhibit 1 demonstrates that the Plaintiff resided in Bentonville on the date of his arrest in Missouri on July 1, 2007. The record does not reflect when the plaintiff's commercial driver's license was issued by the State of Oklahoma.
>
> The record is also deficient as to whether or not Missouri told Oklahoma of the administrative tribunal's findings of fact and conclusions of law suspending the Plaintiff's driver's license from November 14, 2007 to February 12, 2008. It is the finding of this Court that the Missouri agency was an authorized administrative tribunal, and that its finding is tantamount to a conviction.

> Oklahoma did not suspend the Plaintiff's commercial driver's license as mandated by the Code of Federal Regulation. When the Plaintiff began the renewal process in Arkansas in January 2009, all of the hands shook and the Plaintiff's conviction in Missouri became known. Arkansas suspended his driver's license. That suspension was reduced to the Driver Control Hearing Summary, Plaintiff's Exhibit 1.
>
> It is the finding of the Court that the Department of Finance and Administration Office of Driver Services' suspension is to be upheld for a period of nine months from the entry of an order in this matter, giving the Plaintiff credit for the uncontroverted suspension he experienced from November 14, 2007 to February 12, 2008.

(R. 95-96).

Petitioner appealed the Trial Court's decision to the Arkansas Supreme Court, which affirmed the Trial Court's decision that the FMCSR mandated that Respondent disqualify Petitioner's CDL as a result of the MDR administrative finding[4]. *See Burdine v. Arkansas Dep't of Fin. and Admin.*, 2010 Ark. 455 (Ark. 2010). In so holding, the Arkansas Supreme Court recognized that the administrative finding of the MDR constituted a "conviction" for purposes of disqualifying Petitioner's CDL as follows:

---

4. Petitioner's Brief indicates there was a dissent filed in the Arkansas Supreme Court, which is incorrect. Rather, Justice Elana Wills filed a concurring opinion.

> Here, the finding by the MDR, an administrative tribunal, was that Burdine had violated or failed to comply with Missouri law; thus, the finding was a conviction for purposes of the federal regulations. According to the records obtained by DFA, no disqualification had been previously implemented for Burdine's conviction by the MDR, as required by the foregoing regulations. For that reason, DFA disqualified Burdine's CDL for one year, as required by the federal regulations recognized and adopted by this state and set forth above. The circuit court so found, and we cannot say that it clearly erred in doing so.

Burdine, 2010 Ark. 455 at 8. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

Petitioner was arrested for DWI in Missouri, and therefore, the disqualification of Petitioner's CDL was controlled by the Federal Motor Carrier Safety Regulations, and not by reference to the substantive law of Arkansas.

In Petitioner's first point in support of his Petition, Petitioner states, "The FMCSR does not provide which State's law substantively determines whether a 'conviction' has occurred[.]" *See* Petition at 7. Petitioner urges this Court to determine whether the substantive law of Missouri or Arkansas should apply to determine whether Petitioner was "convicted" of an offense of driving a motor vehicle while under the influence of alcohol for purposes

of disqualifying his CDL pursuant to Table 1 to 49 C.F.R. § 383.51(b). Petitioner's Brief contains no meaningful legal analysis or citation to authority in support of the proposition that reference to Arkansas substantive law would be proper in this circumstance. Any reference to Arkansas substantive law to determine whether a violation of a Missouri criminal statute occurred would be absurd.

As an initial matter, the definition of "conviction", for purposes of disqualifying a CDL pursuant to the FMCSR, is substantially similar to the definitions of "conviction" contained in Missouri and Arkansas law for CDL disqualification purposes. 49 C.F.R. § 383.5 defines "conviction" as follows:

> *Conviction* means an unvacated adjudication of guilt, or ***a determination that a person has violated or failed to comply with the law*** in a court of original jurisdiction or ***by an authorized administrative tribunal***, an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated. (Emphasis added).

It is also noteworthy that the Missouri legislature has determined that any outcome in a criminal case has absolutely no effect upon any decision by the MDR to suspend or revoke any driving privilege. More specifically, RSMo § 302.505.3 states:

> The determination of these facts by the department *is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence.* The disposition of those criminal charges *shall not affect any suspension or revocation under this section.* (Emphasis added).

Petitioner asks only that this Court determine whether Arkansas law should apply because, had Petitioner been arrested for DWI in Arkansas and subsequently had the charge dismissed, Arkansas law would provide that the corresponding disqualification of Petitioner's CDL would be reversed. However, what Petitioner fails to recognize or address in his Petition is that the provision of Arkansas law that provides for the reversal of the suspension or disqualification of driving privileges upon a dismissal of the criminal charges *applies only to suspension or disqualification of driving privileges for violations of specific Arkansas criminal statutes. See generally* Ark. Code Ann. § 5-65-402.

The Arkansas legislature has provided two separate statutes to provide for *de novo* circuit court review of a decision of Respondent to suspend, disqualify, or revoke a driver's license. *See* Ark. Code. Ann. §§ 27-16-913 and 5-65-402. Ark. Code Ann. § 27-16-913(a) (Repl. 2008) provides as follows:

> Any person denied a license or whose license has been suspended or revoked by the Office of Driver Services, within thirty (30) days of receipt of the decision by the office to

> deny, suspend, or revoke the license, may file a de novo petition of review in the Pulaski County Circuit Court or the circuit court in the county where the licensee or interested person resides.

Ark. Code Ann. § 5-65-402 applies only to license suspensions, disqualifications, or revocations for violations of specified *Arkansas* criminal laws. More specifically, § 5-65-402 applies to violations for § 3-3-203(a) (Minor in Possession of Alcohol), § 5-27-503(a)(3) (Possession of Fraudulent ID to Purchase Alcohol), § 5-65-103 (Driving While Intoxicated), § 5-65-205 (Refusal to Submit), § 5-65-303 (Underage Driving While Under the Influence ("DUI")), § 5-65-310 (Underage Refusal to Submit), § 27-23-114(a)(1) (Commercial Motor Vehicle DWI), § 27-23-114(a)(2) (Commercial Motor Vehicle DUI); § 27-23-114(a)(5) (Commercial Motor Vehicle Refusal to Submit). *See* Ark. Code Ann. § 5-65-402(a)(1)(A)(Supp. 2009).

Petitioner hopes that this Court will determine that Ark. Code Ann. § 5-65-402(d)(2) should apply to both Petitioner's Missouri arrest and Missouri administrative driver's license suspension hearing. However, the plain reading of this Arkansas statute clearly demonstrates that this statute could not be applied to Petitioner's Missouri arrest. Ark. Code Ann. § 5-65-402(d)(2)(Supp. 2009) provides, in part, as follows:

> (2) Any decision rendered by a court of law for a criminal case arising from any violation of *§ 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5)* shall affect the administrative suspension, disqualification, or revocation of the driver's license as follows:

> (A) A plea of guilty or nolo contendere or a finding of guilt by the court has no effect on any administrative hearing held under this section;
>
> (B) (i) An acquittal on the charges or a dismissal of charges serves to reverse the suspension, disqualification, or revocation of the driver's license suspended or revoked ***under this section***. (Emphasis added).

Clearly, in Ark. Code Ann. § 5-65-402, the Arkansas legislature has provided that only a driver charged with a violation of *specific Arkansas statutes*, i.e., Ark. Code Ann. §§ 3-3-203(a), 5-27-503(a)(3), 5-65-103, 5-65-205, 5-65-303, 5-65-310, 27-23-114(a)(1) or (2), and 27-23-114(a)(5), may have the administrative suspension, disqualification, or revocation of driving privileges imposed under Ark. Code Ann. § 5-65-402 reversed upon acquittal or dismissal of the charges. There is simply no provision in Arkansas law to reverse or disregard an out-of-state administrative license suspension decision as a result of an acquittal or dismissal of the criminal charges from an out-of-state court. Moreover, the Arkansas Supreme Court recognized that Ark. Code Ann. § 27-16-913 was the proper statute from which Petitioner could appeal the Respondent's administrative finding to circuit court. *See Burdine*, 2010 Ark. 455 at 5. The FMCSR does not address whether an acquittal or dismissal of the underlying criminal charges shall have any affect upon a disqualification of a CDL.

Petitioner's driving privileges were not suspended or disqualified for any offense enumerated in Ark. Code Ann. § 5-65-402(a)(1)(A) nor for any offense committed in the State of Arkansas. Rather, the *only* basis for the State of Arkansas to impose the disqualification of Petitioner's

CDL arose from Petitioner's transfer of his out-of-state CDL to Arkansas in January of 2009. Upon Petitioner's transfer of his CDL to Arkansas, 49 C.F.R. § 384.206(a)(2) required Respondent to search Petitioner's driver record. Upon discovery of the administrative suspension for the Missouri DWI, Respondent was required to impose the disqualification pursuant to 49 C.F.R. §§ 384.206(b)(2) and 384.231(b).

Even if Arkansas' statutory definition of "conviction" or the period Arkansas law provides for disqualification of a CDL for a DWI conviction is relevant to this case, it is noteworthy that Arkansas law *identically* mirrors federal law in these two respects. *Compare* Ark. Code Ann. § 27-23-103(9) to 49 C.F.R. § 383.5 ("conviction" defined with *exact* same terms); Ark. Code Ann. § 27-23-112(b)(1)(B) and 49 C.F.R. § 383.51 (CDL holder's privilege to drive a commercial motor vehicle is disqualified for one year if the driver operates a motor vehicle and is convicted of DWI).

In this case, neither the Trial Court's final order nor the Arkansas Supreme Court's November 10, 2010 opinion relied upon any Arkansas substantive law to impose the disqualification of Petitioner's CDL. Rather, both courts relied upon the FMCSR, not State substantive law. *See Burdine*, 2010 Ark. 455 at 7-8; (R. 36). Arkansas law was applicable only in this case for the purpose of establishing a procedure for Petitioner to seek *de novo* review in the circuit court to appeal the administrative decision of Respondent's hearing officer pursuant to Ark. Code Ann. § 27-16-913. *See Burdine*, 2010 Ark. 455 at 5. Any argument that the Arkansas Omnibus DWI Act, Ark. Code Ann. § 5-65-101, et seq, applies in this case is misplaced and is unsupported by statutory law or case law.

In the Trial Court, Respondent relied upon the Missouri Court of Appeals' decision in *Miller v. Director of Revenue*, 277 S.W.3d 290 (Mo.Ct.App. 2009) that an MDR administrative decision to suspend a person's driving privileges may constitute a "conviction" for purposes of imposing a disqualification of an individual's CDL. (Add. 12-13). In *Miller*, a CDL holder was arrested on November 18, 2006 for DWI while operating a non-commercial vehicle. The driver requested the MDR grant him an administrative hearing regarding his driving privileges. The MDR sent Miller two notices regarding his driving privileges. The first notice stated that his CDL would be disqualified effective December 18, 2006 and that he had 30 days to appeal the decision to the circuit court. The second notice sent to Miller stated that an administrative hearing concerning the suspension of his non-commercial driving privileges was scheduled for January 22, 2007. At the January 22, 2007 administrative hearing, the MDR's hearing officer issued findings of fact and conclusions of law which sustained the suspension of Miller's non-commercial driving privileges.

Miller appealed the disqualification of his CDL to circuit court. The circuit court entered its order affirming the disqualification of Miller's CDL wherein it relied upon the January 22, 2007 administrative finding by the MDR to establish the requisite "conviction" pursuant to RSMo § 302.700(8). *Miller*, 277 S.W.3d at 292.

On appeal, the Missouri Court of Appeals affirmed the trial court's disqualification of Miller's CDL based upon the administrative finding of the MDR to establish a "conviction" for purposes of disqualifying Miller's CDL. *Id.* at 293-294. In so holding, the *Miller* court stated as follows:

> Under § 302.755.1(1), "a person is disqualified from driving a commercial motor vehicle for a period of not less than one year if he or she is convicted of driving under the influence of alcohol or a controlled substance." [...] The term "conviction" refers to "an unvacated adjudication of guilt, ... or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or *an authorized administrative proceeding*." § 302.700(8)[.] (Emphasis in original).

Following entry of the Trial Court's final order in this appeal, the Missouri Supreme Court decided *Strup v. Director of Revenue*, 311 S.W.3d 793 (Mo. banc 2010), which presented a factual scenario substantially similar to this appeal. In *Strup*, a CDL holder was arrested on July 22, 2006 for DWI in Missouri; however, the criminal charges were dismissed. On August 23, 2006, the MDR notified Strup that his CDL would be disqualified for one year as a result of his arrest for DWI. Strup requested the MDR grant him an administrative hearing to challenge the suspension of his non-commercial or "base" driving privilege. MDR's hearing officer sustained the suspension of Strup's non-commercial driving privileges.

Strup filed two separate petitions for review in circuit court to challenge the suspension of his non-commercial driving privileges and the disqualification of his CDL, which were consolidated into one action. In the trial court, Strup argued that his due process rights were violated because the MDR's decision to disqualify his CDL was made without a hearing or the opportunity to present or cross-examine witnesses. Strup also argued that the

MDR's decision to disqualify his CDL did not comport with the requirements of RSMo § 302, et seq.

The trial court affirmed the suspension of Strup's non-commercial driving privileges. However, the trial court agreed that Strup's due process rights were violated and the MDR did not properly follow RSMo § 302, et seq, and therefore reversed the decision of the MDR disqualifying Strup's CDL.

On appeal, the Missouri Supreme Court reversed the trial court's decision concerning the disqualification of Strup's CDL. The Missouri Supreme Court reversed the trial court's finding that the MDR did not properly follow Missouri statutory law concerning whether a requisite "conviction" had been established to impose the disqualification of Strup's CDL. In the appeal, the MDR argued that the administrative decision imposing the suspension of Strup's non-commercial driving privileges constitutes a "conviction" for purposes of disqualification of Strup's CDL. The Missouri Supreme Court agreed with the argument of the MDR as follows:

> Under the CDLA[5], a person is disqualified from driving a commercial motor vehicle for a period of not less than one year if "*convicted*" of a first violation. Section 302.755.1, RSMo Supp. 2005 (emphasis added). The CDLA defines "conviction" as "an unvacated adjudication of guilt, including pleas of guilt and nolo contendere, or *a determination that a person has violated or failed to comply with the*

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> *law in* a court of original jurisdiction or *an authorized administrative proceeding* ...." Section 302.700.2(8), RSMo Supp. 2005 (emphasis added).
>
> One of the first violations that establishes a "conviction" and merits disqualification under the CDLA is "[d]riving a motor vehicle under the influence of alcohol ...." Section 302.755.1(1). "Driving under the influence of alcohol" is defined in the CDLA to include "[h]aving any state, county or municipal alcohol-related enforcement contact, as defined in subsection 3 of section 302.525 ...." Section 302.700.2(13)(e). "Alcohol-related enforcement contact" includes "any suspension or revocation under sections 302.500 to 302.540 ...." Section 302.525.3, RSMo Supp. 2002.
>
> The circuit court erred in reversing the disqualification of Strup's commercial driving privilege because the suspension of Strup's base driver's license constitutes a conviction of driving under the influence of alcohol for the purposes of the CDLA, which is a first violation that merits disqualification of a person's commercial driver's privilege for a period of not less than one year.

Strup, 311 S.W.3d at 797-798.

The factual circumstances regarding Petitioner's arrest are almost identical to those in the *Strup* case. Petitioner was arrested in Missouri for DWI and was

granted an administrative hearing concerning his non-commerical driving privileges. (R. 138-140). The MDR hearing officer determined to sustain the imposition of the suspension of Petitioner's non-commercial driving privileges. *Id.* Like Strup's criminal DWI charge, Petitioner's criminal charge of DWI was dismissed by the prosecuting attorney. (R. 119).

For undetermined reasons in this case, the MDR did not impose the disqualification of Petitioner's CDL. When Petitioner transferred his CDL to Arkansas in January of 2009, 49 C.F.R. § 384.206(a)(2) mandated Respondent to obtain Petitioner's driver record for the prior ten (10) years. Respondent determined that Petitioner had adverse information in Petitioner's driver record and notified Petitioner in writing that Respondent would impose the disqualification as a result of the Missouri DWI license suspension pursuant to 49 C.F.R. §§ 384.206(b)(2) and 384.231(b). (R. 109-112). Petitioner was granted an administrative hearing before Respondent's Office of Driver Services as well as *de novo* hearing before the Circuit Court of Benton County, Arkansas. (R. 12, 35-36).

Respondent's administrative hearing officer and the Trial Court determined that the MDR administrative proceeding finding that Petitioner's driving privilege should be suspended constitutes a "conviction" for purposes of imposing the one-year disqualification of Petitioner's CDL. The Arkansas Supreme Court affirmed the Trial Court in all respects. The Missouri Court of Appeals in *Miller* and the Missouri Supreme Court in *Strup* established that it is proper for a Missouri trial court to rely upon an administrative finding that a person has been "convicted" of DWI to impose a CDL

disqualification. Petitioner has failed to address in his Petition either the *Miller* or *Strup* decisions or to cite any legal authorities that stand for countervailing positions.

From a review of authorities cited herein and the factual circumstances regarding Petitioner's arrest for DWI, it is clear that the MDR should have imposed the disqualification of Petitioner's CDL but failed to do so. Upon Petitioner's transfer of his CDL to Arkansas, Respondent promptly and properly imposed the disqualification as required by 49 C.F.R. §§ 384.206(b)(2) and 384.231(b). Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. Accordingly, the Petition for Writ of Certiorai should be denied.

The unambiguous language of 49 C.F.R. § 383.5 clearly recognizes that an administrative determination of the MDR that Petitioner violated or failed to comply with the law constitutes a "conviction" of DWI for purposes of disqualifying a CDL.

In support of Petitioner's second point in support of his Petition, Petitioner argues as follows:

> The Missouri Department of Revenue, an administrative tribunal, made the finding that Petitioner had been *arrested* upon probable cause to believe that he was driving a motor vehicle while his alcohol concentration was at or above the limit required by 302.505, RSMo. At no time did a Missouri *court* find that Petitioner was "under the influence as prescribed by [Missouri's] State law."

> Arkansas in turn determined Missouri's action to be tantamount to a conviction for purpose of the FMCSR. As a practical matter, Arkansas interpreted the fact that Missouri *suspended* Petitioner's license as the conviction – not that Petitioner's arrest was the conviction – wholly contrary to the plain language of the relevant FMCSR.

See Petition at 12-13.

As an initial matter, Petitioner concedes that the MDR is an administrative tribunal capable of rendering a administrative decision that would constitute a "conviction" for CDL disqualification purposes. More specifically, as noted above, Petitioner states, "The Missouri Department of Revenue, ***an administrative tribunal***, made the finding [...]". (Emphasis added). *See* Petition at 12. However, Petitioner then appears to contradict himself in his next sentence as follows, "At no time did a Missouri *court* find that Petitioner was "under the influence as prescribed by [Missouri's] State law." *Id.*

Clearly, a decision by a *court* that a person has violated or failed to comply with the law is not the only means to determine that a person has been "convicted". More specifically, 49 C.F.R. § 383.5 defines "conviction" to include a finding by an administrative tribunal as follows:

> *Conviction* means an unvacated adjudication of guilt, or ***a determination that a person has violated or failed to comply with the law*** in a court of original jurisdiction or ***by an authorized administrative tribunal***,

> an unvacated forfeiture of bail or collateral deposited to secure the person's appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated. (Emphasis added).

The administrative decision of the MDR stated as follows:

> 2. The *sole issue to be decided is whether by a preponderance of the evidence, the person was driving a vehicle pursuant to the circumstances set out in Section 302.505, RSMo.*
>
> ...
>
> 4. Based upon the preponderance of the evidence presented at the administrative hearing, Petitioner is found to have been arrested/stopped *upon probable cause to believe Petitioner was driving a motor vehicle while the alcohol concentration in the blood was at or above the limit required by Section 302.505*, RSMo, or if under age twenty-one, was stopped while operating a motor vehicle with a blood alcohol content of .02% or more by weight, and the Notice of Suspension/Revocation was therefore properly issued to or served upon Petitioner pursuant to Section 302.515 or 302.520, RSMo.

> 5. Administrative suspension or revocation of Petitioner's privilege to drive in the State of Missouri is required by Sections 302.505 and 302.525 RSMo.
>
> NOW, THEREFORE, IT IS THE DECISION OF THE MISSOURI DEPARTMENT OF REVENUE, that the issuance of the Notice of Suspension/Revocation is SUSTAINED. Petitioner's privilege to drive in the State of Missouri is hereby suspended as authorized and required by Sections 302.505 and 302.525, RSMo.

(R. 140).

Clearly, the plain language of the MDR administrative decision demonstrates that the MDR was to determine whether, by a preponderance of the evidence, there was probable cause to believe Petitioner was driving a motor vehicle while his alcohol concentration in his blood was at or above the limit required by RSMo § 302.505. The level of blood alcohol concentration ("BAC") prohibited by RSMo § 302.505 is eight-hundreths of one percent or more by weight (0.08%). Petitioner provided a BAC sample following his arrest of 0.08%, which clearly demonstrates that he was at the limit prohibited by RSMo § 302.505. (R. 132). Accordingly, the MDR suspended Petitioner's non-commercial driving privileges based upon this administrative finding. However, the MDR failed to disqualify Petitioner's CDL, which, pursuant to the Missouri Supreme Court's decision in *Strup*, it clearly should have done.

Respondent relied upon the administrative finding of the MDR to implement the disqualification of Petitioner's CDL as mandated by 49 C.F.R. §§ 384.206(b)(2) and 384.231(b). The Trial Court in Arkansas agreed that Respondent correctly relied upon the MDR administrative finding, which was affirmed by the Arkansas Supreme Court. Petitioner has failed to present an important question of federal law that has not been, but should be, settled by this Court. Accordingly, the Petition for Writ of Certiorai should be denied.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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